(19,077.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 121.

P. L. FLANIGAN, PETITIONER,

vs.

THE COUNTY OF SIERRA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 8, 1904.

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a In the United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Transcript of Record.

Upon Writ of Error to the United States Circuit Court for the Northern District of California.

1 In the Superior Court of the State of California in and for the State of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Complaint.

The plaintiff complains of defendant, and for cause of action alleges:

I.

That the County of Sierra is a body politic and corporate under the laws of the State of California.

II.

That on the 31st day of May, A. D. 1900, the board of supervisors of said Sierra county ordained and passed the following ordinance, to wit:

"*Ordinance No.* 54.

An ordinance to license the business of raising, grazing, herding, or pasturing sheep within the county of Sierra, fixing the rates of the license tax therefor, and providing for the collection of the same.

The board of supervisors of the county of Sierra do ordain as follows:

2 SECTION 1.

Each and every person, copartnership, firm or corporation engaged in the business of raising, grazing, herding or pasturing sheep in the county of Sierra, State of California, must annually procure a

license therefor from the license collector, and must pay therefor the sum of ten (10) cents for each sheep or lamb owned by, in the possession of, or under the control of such person, copartnership, firm or corporation, and used in such business in said county.

SECTION 2.

Each and every person, copartnership, firm or corporation, who may engage in the business of raising, grazing, herding or pasturing sheep within the county of Sierra, State of California, in order to procure a license therefor, must present to the license collector of said county at the time of making application therefor the affidavit of such owner, his foreman, agent or person in charge of such sheep, showing the number of sheep owned by, and in the possession of and under the control of such applicant for license within said county, and upon presenting such affidavit and the payment of the license tax, as prescribed in section 1 of this ordinance, the applicant shall be granted a license to raise, graze, herd or pasture sheep within the said county of Sierra.

The collector, or his deputy, may administer all oaths under this section, and must do so without charge.

SECTION 3.

Each applicant for license under this ordinance must, if re-
3 quired by the collector, permit the sheep owned by him or under his control to be counted, and in case of refusal to make the affidavit mentioned in section 2 of this ordinance it is hereby made the duty of said collector to count said sheep prior to his issuing said license.

SECTION 4.

All licenses to be collected under this ordinance are payable annually, and shall become due and payable in advance at the office of the license collector, and if any license is not paid within fifteen days after the commencement of said business, an additional tax of ten per cent. is hereby added, to be collected with the original amount.

SECTION 5.

The county auditor shall prepare and have printed suitable blank licenses for the license collector to carry out the provisions of this ordinance, with blank receipts for the license collector when sold.

SECTION 6.

The license collector must return the stubs of all licenses sold by him to the auditor, together with the affidavit mentioned in section two of this ordinance, and the auditor must keep the same in his office for the period of one year after the license corresponding with

such stubs have been sold by the license- collector, or until such further time as the license account has been examined by an expert legally appointed as such, and said expert shall report such license account correct and his report has been approved by the board of supervisors, after which time the auditor may destroy the stubs.

4 SECTION 7.

The amount of the license tax fixed by this ordinance for the transaction or carrying on of any business named herein shall be deemed a debt due to the county of Sierra, and if any person fails neglects, or refuses to take out and procure a license used under the provisions and in the manner provided in this ordinance, the said license collector shall direct the district attorney of said county to bring suit in the name of the county of Sierra for the recovery of such license, and in such case either the license collector or the district attorney may make the necessary affidavits for, and a writ of attachment may issue without any bonds on the part of the plaintiff, and in case of recovery by the plaintiff fifty dollars damages and costs must be added to the judgment to be collected from the defendant.

SECTION 8.

The license collector shall issue licenses for the year in which said license is procured, and out of each license collected by him he may retain for his fee therefor the sum of 10 per cent. thereof, which said fee shall belong to him. Provided that in all cases where said collector does not return the affidavit with the stub of the license, as provided for in section six of this ordinance, said fee shall not be retained by said collector nor belong to him, except that in lieu of said affidavit he may return with said stub the affidavit of himself or deputy, showing that he has counted the sheep for the pasturing of which a license was granted without the affidavit mentioned
5 in section two of this ordinance, whereupon he may retain said fee, but in case said affidavit mentioned in said section two, or the affidavit of himself or deputy, as to the counting of said sheep is not returned with said stub, the whole of the said amount received for said license shall be paid over to said county.

SECTION 9.

Years within the meaning of this ordinance shall commence on the 1st day of January, and end on the 31st day of December.

SECTION 10.

All money collected for licenses under the provisions of this ordinance, less said fee of ten per cent., shall be paid over to the county treasurer, as other moneys are, and be placed to the credit of the general fund of the county.

All ordinances, or parts of ordinances, in conflict herewith are hereby repealed; provided, however, that nothing in this ordinance shall be so construed as to prevent said Sierra county from recovering, by suit or otherwise, any license tax that may have heretofore accrued under any former law or ordinance, or from instituting or conducting such proceedings, civil or criminal, as may be provided for in such former law or ordinance.

This ordinance shall take effect on and after fifteen days from its passage.

The above ordinance having been read to, and duly considered by the board, was put upon it passage, and was adopted and passed by the board of superivisors of Sierra county, California, at a special meeting thereof called for said purpose, this 31st day of May, A. D. 1900, by the following vote:

6 First district, William Donaldson, aye; second district, Clarence Hooper, aye; third district, Henry H. Meyer, aye; fourth district, J. M. Gorham, aye; fifth district, J. J. Millar, aye.

HENRY H. MEYER,
Chairman of said Board.

Attest:
[SEAL.] HENRY E. QUIGLEY, *Clerk.*

STATE OF CALIFORNIA, } *ss:*
County of Sierra, }

I, Henry E. Quigley, clerk of the county of Sierra, and *ex-officio* clerk of the board of supervisors of said county, do hereby certify that the foregoing ordinance, entitled ordinance No. 54, consisting of ten sections, was duly passed by the said board of supervisors at a special meeting thereof called for said purpose, on the 31st day of May, 1900, and by the following vote: Ayes, Supervisors William Donaldson, Clarence Hooper, H. H. Meyer, J. M. Gorham and J. J. Millar; noes, none.

[SEAL.] HENRY E. QUIGLEY,
County Clerk of Sierra County and ex-Officio Clerk of the Board of Supervisors."

III.

That said ordinance No. 54 was duly enacted, passed and ordained at a special meeting of the said board of supervisors duly called for said purpose. That said ordinance was upon the passage of the same signed by the chairman of the board of supervisors and attested by the clerk, and the votes of the several members
7 of the board were entered on the minutes of said board, and on the 31st day of May, 1900, said ordinance was duly entered at length in the ordinance book of said county.

Before the expiration of fifteen days after the same was passed said ordinance was duly published, with the names of the members

of said board voting for and against the same, for at least one week in the "Mountain Messenger," a newspaper published in said county.

IV.

That the said defendant, between the 1st day of May, 1900, and the 25th day of June, 1900, was engaged in and still is engaged in the business of raising, grazing, herding and pasturing sheep in the said county of Sierra, State of California, and that he then had and now has in his possession and under his control and in said business twenty-five thousand (25,000) sheep.

V.

That said defendant has not procured from the license collector of said county the license provided for in said ordinance, nor has he paid therefor the said sum of ten cents for each sheep or lamb so in his possession and under his control in said business as aforesaid.

VI.

That the defendant, under the provisions of said ordinance No. 54, became and is now indebted to the said county of Sierra in the sum of two thousand five hundred (2,500) dollars for a license for the carrying on of said business in said county, and is further
8 indebted to said plaintiff in the sum of fifty (50) dollars damages for his neglect in procuring said license.

VII.

That the plaintiff has duly demanded payment of defendant of said license under the provisions of said ordinance, but the said defendant has not paid any part thereof, and there is now due and owing from said defendant to plaintiff the sum of two thousand five hundred and fifty dollars for said license and damages as aforesaid.

VIII.

That the license tax collector of said county has directed the district attorney of said county to bring this suit.

Wherefore the plaintiff demands judgment against the said defendant for the sum of two thousand five hundred and fifty dollars, together with costs of this action.

FRANK R. WEHE,
District Attorney of Sierra Co.

STATE OF CALIFORNIA, } ss:
County of Sierra, }

August C. Busch, being first duly sworn, says that he is the license collector of said county; that he has heard the said complaint read, and knows the contents thereof; that the same is true of his own

knowledge, except as to those matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

AUG. C. BUSCH.

9 Subscribed and sworn to before me, this 25th day of June, 1900.

[NOTARY SEAL.] FRANK R. WEHE,
Notary Public in and for Sierra Co., Cal.

(Endorsed:) Filed June 25, 1900. Henry E. Quigley, clerk.

In the Superior Court of the County of Sierra, State of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Notice of Motion for Order of Removal of Cause.

To Frank R. Wehe, district attorney of Sierra county, attorney for plaintiff:

Please take notice that the defendant in the above-entitled case will, on Tuesday the 7th day of August, 1900, at ten o'clock a. m., or as soon thereafter as counsel can be heard, move the above-entitled court for an order removing said cause to the circuit court of the United States, for the northern district of California, ninth circuit, in accordance with the petition of defendant, a copy of which is hereto attached.

Dated July 31st 1900.

CAMPBELL & METSON,
Attorneys for Defendant.

10 (Endorsed:) Original. In the superior court of the county of Sierra, State of California. The County of Sierra, plaintiff, vs. P. L. Flanigan, defendant. Notice of motion. Filed July 31st, 1900. Henry E. Quigley, clerk. Reddy, Campbell & Metson, attorneys for —.

In the Superior Court of the County of Sierra, State of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Special Appearance of Defendant.

To the plaintiff in the above-entitled case and to Frank R. Wehe, Esq., its attorney:

You are hereby notified that we, the undersigned, hereby enter our special appearance in the above-entitled case for the special pur-

pose, and none other, of filing a petition and bond for the removal of said case to the circuit court of the United States, ninth circuit, northern district of California.

CAMPBELL & METSON,
Attorneys for Defendant.

(Endorsed:) Original. In the superior court of the county
11 of Sierra, State of California. The County of Sierra, plaintiff, *vs.* P. L. Flanigan, defendant. Special appearance. Filed July 31st, 1900. Henry E. Quigley, clerk. Reddy, Campbell & Metson, attorneys for defendant.

In the Superior Court of the County of Sierra, State of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Bond on Removal.

Know all men by these presents, that we, P. L. Flanigan, defendant in the above-entitled action, as principal, and The United States Fidelity and Guaranty Company, a corporation, of Baltimore, Md., as surety, are held and firmly bound unto the County of Sierra, a body politic and municipal corporation under the laws of the State of California, plaintiff in the above-entitled action, in the sum of one thousand dollars ($1,000), lawful money of the United States of America, for the payment of which, well and truly to be made, we, and each of us, bind ourselves, and each of us, our successors, heirs, executors and administrators, jointly and severally by these presents.

The conditions of this obligation are such that, whereas,
12 the said P. L. Flanigan has applied, or is about to apply, by petition to the superior court of the State of California, in and for the county of Sierra, for the removal of a certain cause therein pending, wherein The County of Sierra, a body politic and municipal corporation under the laws of the State of California, is plaintiff, and P. L. Flanigan is defendant, to the circuit court of the United States, ninth circuit, for the northern district of California, for further proceedings, on the grounds in the said petition set forth, and that all further proceedings in said superior court in and for the county of Sierra be stayed:

Now therefore, if your petitioner, said P. L. Flanigan, shall enter in said circuit court of the United States, for the northern district of California aforesaid, on or before the first day of its next regular session, a copy of the records in said suit, and shall pay, or cause to be paid, all costs that may be awarded therein by the said circuit court of the United States, if said court shall hold that said suit was

wrongfully or improperly removed thereto, then this obligation shall be void; otherwise shall remain in full force and effect.

P. L. FLANIGAN.
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Corporation Seal.]

By its attorneys in fact, I. D. MAXWELL AND W. RIGBY.

Signed, subscribed and sworn to this — day of ——, 1900.

—— ——.

13 (Endorsed:) Original. In the superior court of the county of Sierra, State of California. The County of Sierra, plaintiff, vs. P. L. Flanigan, defendant. Bond. Filed July 31st, 1900. Henry E. Quigley, clerk. Reddy, Campbell & Metson, attorneys for defendant.

In the Superior Court of the County of Sierra, State of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Petition for Removal of Cause.

To the honorable superior court of Sierra county, State of California:

The petition of P. L. Flanigan, the defendant in the above-entitled action, respectfully shows to this honorable court:

I.

That your petitioner is the defendant in the above-entitled action; that the said action has been commenced against him in the said court by the plaintiff, to wit, The County of Sierra, a body politic and municipal corporation, under the laws of the State of California, and that said action is of a civil nature.

14 II.

That the said plaintiff, on the 25th day of June, 1900, filed its complaint against this defendant in the superior court of the State of California, in and for the county of Sierra;

That the time has not elapsed wherein your petitioner is allowed, under the practice and laws of the State of California, and the rules of said court, to appear, plead, demur, or answer said complaint.

III.

That at the time said action was commenced, and continuously for a long time prior thereto, ever since, and at all the times herein

mentioned, the said plaintiff, The County of Sierra, was and is a body politic and municipal corporation under the laws of the State of California; and that the said plaintiff, to wit, The County of Sierra, a body politic and municipal corporation under the laws of the State of California, was, at the time said action was commenced, and continuously for a long time prior thereto, ever since, and at all the time herein mentioned, is and was a citizen and resident of the State of California, within the jurisdiction of the United States circuit court, northern district of California, State of California.

That at the time said action was commenced, and continuously for some time prior thereto, ever since, and at all the times herein mentioned, the defendant was and is a resident and citizen of the State of Nevada, and not a resident of the State of California.

15 IV.

That the controversy in this action, and every issue of fact and law therein, is wholly between citizens of different States; and every issue of fact and law involved in this controversy can be fully determined as between them, that is to say, as between this plaintiff, The County of Sierra, a body politic and municipal corporation, and this defendant, P. L. Flanigan.

V.

That the time of this defendant, your petitioner here, to answer or plead to the complaint in the said action filed as aforesaid, in the said superior court of California, in and for the county of Sierra, on the 25th day of June, 1900, has not yet expired; and your petitioner has not yet filed any paper, appearance, or pleading in said action, nor has it in any other way appeared therein.

VI.

That the matter in dispute in said action, and for which said action is brought, is an alleged debt, to wit, the sum of two thousand five hundred and fifty dollars, exclusive of costs, alleged to be due from defendant to plaintiff.

VII.

Your petitioner herewith presents a good and sufficient bond, as provided by the statute in such case, that it will on or before the first day of the next ensuing session of the United States circuit court, northern district of California, file therein a transcript of the record in this action, and for the payment of all costs which
16 may be awarded by the said court, if said circuit court shall hold that this suit was wrongfully or improperly removed hereto; and your petitioner prays that this court proceed no further herein except to make the order of removal as required by law, and accept the bond presented herewith, and direct the tran-

script of the record herein to be made for said court, as provided by law, and as in duty bound, and your petitioner will ever pray.

P. L. FLANIGAN, *Petitioner.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

P. L. Flanigan, being duly sworn, says: that he is the defendant in the above-entitled action, and has read the foregoing petition subscribed by him, and knows the contents thereof, and that the same is true of his own knowledge.

P. L. FLANIGAN.

Subscribed and sworn to before me this 26th day of July, A. D. 1900.

[SEAL.] HOLLAND SMITH,
Notary Public in and for the City and County of San Francisco, State of California.

(Endorsed:) Original. In the superior court of the county of Sierra, State of California. The County of Sierra, plaintiff, *vs.* P. L. Flanigan, defendant. Petition. Filed July 31st, 1900. Henry E. Quigley, clerk. Reddy, Campbell & Metson, attorneys for defendant.

17 In the Superior Court of the County of Sierra, State of California.

THE COUNTY OF SIERRA, Plaintiff, }
vs.
P. L. FLANIGAN, Defendant. }

Order of Removal of Cause.

On the pleadings and proceedings herein, and on the petition and bond filed herein by the defendant under the statutes of the United States, and on motion of Campbell & Metson, defendant's attorneys, it is ordered that the security offered by the defendant be accepted and said bond approved, and that the State court proceed no further in this cause, and that this cause be removed into the United States circuit court, ninth circuit, northern district of California, State of California.

Dated August 8, 1900.

STANLEY A. SMITH, *Judge.*

(Endorsed:) Original. In the superior court of the county of Sierra, State of California. The County of Sierra, plaintiff, *vs.* P. L. Flanigan, defendant. Order. Filed August 9th, 1900. Henry E. Quigley, clerk. Campbell & Metson, attorneys for defendant.

18 STATE OF CALIFORNIA, } ss:
County of Sierra, }

I, Henry E. Quigley, county clerk and *ex-officio* clerk of the superior court, in and for the county of Sierra, State of California, said court being a court of record, having a seal, hereby certify that the foregoing is a full, true and correct copy of the original complaint, petition for removal to circuit court, bond on same, special appearance, notice of motion for removal and order of court approving bond and ordering removal to circuit court, comprising the entire record in case No. 991, in which The County of Sierra, plaintiff, *vs.* P. L. Flanigan, defendant, as the same now remains of record and on file in the office of the clerk of said court.

Witness my hand, with the seal of said court affixed, this 9th day of August, 1900.

[Seal of Superior Court of Sierra County.]

HENRY E. QUIGLEY, *Clerk.*

(10c. internal revenue stamp.)

(Endorsed:) No. 12,967. United States circuit court, northern district of California. The County of Sierra *vs.* P. L. Flanigan. Certified copy of record transferred from Sierra county. Filed August 13, 1900. Southard Hoffman, clerk.

19 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE COUNTY OF SIERRA, Plaintiff, }
vs.
P. L. FLANIGAN, Defendant. }

Demurrer.

Comes now the defendant and demurs to plaintiff's complaint, and assigns the following ground of demurrer:

That said complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays to be hence dismissed with his costs.

J. C. CAMPBELL AND
W. H. METSON,
Attorneys for Defendant.

NORTHERN DISTRICT OF CALIFORNIA, } ss:
City and County of San Francisco, }

J. C. Campbell, being first duly sworn, on oath says that he is one of the attorneys of the defendant in the above-entitled action; that

the foregoing demurrer is not interposed for delay; that affiant makes this affidavit for the reason that defendant is absent
20 from and now out of the city and county of San Francisco wherein affiant resides.

J. C. CAMPBELL.

Subscribed and sworn to before me this 14th day of August, 1900.

[SEAL.] HOLLAND SMITH,
Notary Public, City and County of San Francisco.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.
Dated August 14th, 1900.

J. C. CAMPBELL,
Attorney for Defendant.

(Endorsed:) Filed August 16th, 1900. Southard Hoffman, clerk.

At a stated term, to wit, the November term, A. D. 1901, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the courtroom in the city and county of San Francisco, on Monday, the 25th day of November, in the year of our Lord one thousand nine hundred and one.
Present: The Honorable William W. Morrow, circuit judge.

THE COUNTY OF SIERRA
vs.
P. L. FLANIGAN. } No. 12967.

Order Overruling Demurrer.

Defendant's demurrer to the complaint herein, heretofore
21 heard and submitted, having been fully considered, it was ordered that said demurrer be and hereby is overruled, in accordance with the oral opinion of the court this day delivered, with leave to defendant to answer within twenty days.
At a stated term, to wit, the March term, A. D. 1902, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California held at the courtroom in the city and county of San Francisco, on Friday, the 7th day of March, in the year of our Lord one thousand nine hundred and two.
Present: The Honorable William W. Morrow, circuit judge.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant. } No. 12967.

Order for Default and Judgment, etc.

In this cause the court having upon the 25th day of November, 1901, overruled defendant's demurrer to the complaint of plaintiff, with leave to defendant to answer said complaint within twenty days; and said time for answering having expired, and not having been extended, and said defendant having failed to answer the complaint herein, now upon motion of Frank R. Wehe, Esq., attorney for plaintiff, it is ordered that the default of said defendant
22 P. L. Flanigan be, and hereby is, entered herein, and it is further ordered that judgment be entered herein in favor of plaintiff and against the defendant in accordance with the prayer of plaintiff's complaint and for costs.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant. } No. 12967.

Judgment.

In this cause the court having upon motion of Frank R. Wehe, Esq., attorney for plaintiff, ordered that the default of the defendant be entered for failure to file an answer to the complaint within the time allowed by the court after the overruling of said defendant's demurrer to the complaint; and said default having been entered, and the court having thereupon ordered that judgment be entered in favor of plaintiff and against the defendant in accordance with the prayer of the complaint herein and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that the plaintiff, The County of Sierra, do have and recover of and from said de-
23 fendant, P. L. Flanigan, the sum of two thousand five hundred and fifty dollars, together with its costs in this behalf expended, taxed at $26.20.

Judgment entered March 7th, 1902.

SOUTHARD HOFFMAN, *Clerk.*

A true copy:
Attest:
[SEAL.]

SOUTHARD HOFFMAN, *Clerk,*
By W. B. BEAIZLEY, *Deputy Clerk.*

(Endorsed:) Filed March 7, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

COUNTY OF SIERRA
vs.
P. L. FLANIGAN. } No. 12967.

Certificate to Judgment-roll.

I, Southard Hoffman, clerk of the circuit court of the United States, for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this 7th day of March, 1902.

[SEAL.]

SOUTHARD HOFFMAN, *Clerk*,
By W. B. BEAIZLEY, *Deputy Clerk*.

24 (Endorsed:) Judgment-roll. Filed March 7, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Petition for Writ of Error and Supersedeas.

P. L. Flanigan, the defendant above named, feeling himself aggrieved by the judgment of the above-entitled court, entered herein on the 7th day of March, 1902, comes now and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable, the United States circuit of appeals for the ninth circuit, and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the said defendant shall give and furnish upon the said writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States circuit court of appeals for the ninth circuit, and your petitioner will ever pray.

A. E. CHENEY,
CAMPBELL, METSON & CAMPBELL,
Attorneys for Defendant.

(Endorsed:) Filed April 4, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Assignment of Errors.

Afterward comes P. L. Flanigan, the defendant above named, and says in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

I.

That the complaint of plaintiff above named in the said action does not state facts sufficient to constitute a cause of action.

II.

That the above-entitled court erred in making and entering, on, to wit, the 25th day of November, 1901, that certain minute order wherein and whereby the demurrer of said defendant to the said complaint was overruled.

III.

That said court erred in making and entering, on, to wit,
26 the 7th day of March, 1902, its order that the default of said defendant be entered for failure to file an answer to said complaint within the time allowed by said court after the overruling of said defendant's demurrer to said complaint.

IV.

That said court erred in giving, making and entering its certain judgment in said action that said plaintiff do have and recover from said defendant the sum of two thousand five hundred and fifty dollars, together with its costs in such behalf expended.

V.

That said court erred in giving, making and entering in said action its judgment in favor of said plaintiff and against said defendant.

Wherefore, said defendant prays that said judgment of said circuit court of the United States, in and for the ninth circuit, northern district of California, be reversed, and that said court be ordered to

make and enter its judgment that said plaintiff take nothing by its said action, but that said defendant be thence dismissed with judgment for his costs in such behalf expended.

A. E. CHENEY,
CAMPBELL, METSON & CAMPBLLL,
Attorneys for Defendant.

(Endorsed:) Filed April 4, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

27 At a stated term, to wit, the February term, A. D. 1902, of the circuit court of the United States, ninth circuit, northern district of California, held at the courtroom thereof in the city of San Francisco, on the 4th day of April, in the year of our Lord, one thousand nine hundred and two.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Order Allowing Writ of Error.

Upon motion of the defendant above named, and upon filing a petition for a writ of error and an assignment of errors herein.

It is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States circuit court of appeals for the ninth circuit, the judgment heretofore entered herein.

Dated this 4th day of April, 1902.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed April 4, 1902. Southard Hoffman, clerk.

28 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Order Fixing Amount of Bond and Supersedeas.

The defendant above named having this day filed his petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States circuit court of appeals in and for the ninth circuit, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said writ

of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the said United States circuit court of appeals in and for the ninth circuit, and said petition having this day been duly allowed:

Now, therefore, it is ordered that upon the said defendant filing with the clerk of this court a good and sufficient bond in the sum of $3,000, to the effect that if the said defendant and plaintiff in error, shall prosecute the said writ of error to effect, and
29 answer all damages and costs, if he fail to make his plea good, then then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the court that all proceedings in this court be, and the same are hereby, suspended and stayed until the determination of said writ of error by the said United States circuit court of appeals.

Dated this 4th day of April, 1902.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed April 4th, 1902. Southard Hoffman, clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, P. L. Flanigan, and The United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto the plaintiff above named in the sum of three thousand dollars ($3,000), to be paid to the said plaintiff, to which payment well and
30 truly to be made we bind ourselves, and each of us, jointly and severally, and our, and each of our successors, representatives, and assigns, firmly by these presents.

Sealed with our seals and dated this 4th day of April, A. D. 1902.

Whereas, the above-named defendant has sued out a writ of error in the United States circuit court of appeals, in and for the ninth circuit, to reverse the judgment in the above-entitled cause by the circuit court of the United States, ninth circuit, northern district of California.

Now, therefore, the condition of this obligation is such that if the above-named defendant, P. L. Flanigan, shall prosecute said writ to effect and answer all costs and damages, if he shall fail to make

good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

P. L. FLANIGAN. [SEAL]
By J. C. CAMPBELL, *Attorney.*
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Corporate Seal.]

By its attorney in fact, JOHN H. ROBERTSON.

Whereas, the United States Fidelity and Guaranty Company, a corporation duly incorporated under the laws of the State of Maryland, has deposited with me its charter or articles of incorporation and the statement required by section 3 of an act of Congress
31 approved August 13, 1894, and entitled "An act relative to recognizances, stipulations, bonds, and undertakings, and to allow certain corporations to be accepted as surety thereon;" and has satisfied me that it has authority under its charter to do the business provided for in said act, that it has a paid up capital of not less than $250,000.00 in cash or its equivalent, and that it is able to keep and perform its contracts.

Now, therefore, the said United States Fidelity and Guaranty Company is hereby granted authority to do business under said act in said State of Maryland and is also granted authority to do business under said act beyond the limits of said State in any judicial district of the United States in which it shall first have appointed an agent conformably to the provisions of section 2 of said act.

HOLMES CONRAD,
Acting Attorney-General.

Department of Justice, Washington, D. C., September 25, 1896.

[DEPARTMENT SEAL.]

DEPARTMENT OF JUSTICE,
WASHINGTON, D. C., *Dec.* 7, 1901.

The annexed is a true copy of an original authorization to do business, issued by the Attorney-General, under the act of Congress approved August 13, 1894.

Witness my hand and the seal of the department.

[SEAL.] CECIL CLAY,
Chief Clerk.

32 *Statement of the United States Fidelity and Guaranty Company, Rendered to the Department of Justice, Washington, D. C.*

At the close of business, March 31st, 1902.

Commenced business August 1st, 1896.

Assets:

Investments, stocks and bonds (market value)	$1,326,479.85	
Cash on hand and in banks	398,335.42	
Collateral loans	570,894.00	
Real estate	130,629.58	
Loans secured by mortgages	22,000.00	
Mortgages and other collateral a/c salvage	14,599.61	
Advanced a/c contracts secured	37,958.99	
Agents' balances, Fidelity and Surety, less commissions	176,965.94	
Agents' balances, burglary, less commissions	29,277.91	
Due for subscriptions department of guaranteed attorneys	24,752.14	
Interest due and accrued	19,790.04	
		$2,751,683.48

33 Liabilities:

Capital stock paid in cash	$1,500,000.00	
Cash collateral deposits	148,087.38	
Surplus and reserve	1,103,596.10	
		$2,751,683.48

JOHN R. BLAND, *President.*

GEORGE R. CALLIS, *Secretary.*

STATE OF MARYLAND, *City of Baltimore,* } ss:

On this 7th day of April, 1902, before me, A. D. Patrick, a notary public in and for the city and State aforesaid, appeared John R. Bland and George R. Callis, president and secretary respectively, of the United States Fidelity and Guaranty Company, who, being by me severally duly sworn, did depose and say that they are such officers of the said company, and that the above and foregoing is a full, true and correct statement of the assets and liabilities of the said company, as they appeared upon the books of the said company on the 31st day of March, A. D. 1902.

In witness whereof, I have hereunto set my hand and official seal, the day and year aforesaid.

[NOTARIAL SEAL.] A. D. PATRICK,
Notary Public.

Form 400.

34 *Form of Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

On this 4th day of April, one thousand nine hundred —, before me personally came John H. Robertson, known to me to be the attorney in fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of P. L. Flannigan, as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the city of San Francisco, State of California, that he is the attorney in fact of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond (form —) of P. L. Flannigan, is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the board of directors
35 of said company; and that he signed his name thereto by like order and authority as attorney in fact of said company; and that John H. Robertson is the duly authorized agent and attorney of the said The United States Fidelity and Guaranty Company, to accept service of the process in the northern judicial district of the State of California, and that the assets of said company, unencumbered and liable to execution, exceed its claims, debts and liabilities of every nature whatsoever, by more than the sum of one million five hundred thousand dollars ($1,500,000.00).

JOHN H. ROBERTSON.

Sworn to, acknowledged before me, and subscribed in my presence this 4th day of April, 1902.

W. B. HARDING,
Notary Public in and for the City and
[SEAL.] *County of San Francisco, Cal.*

(Endorsed:) The within bond is approved. Wm. W. Morrow, judge.

Filed April 5th, 1902.

SOUTHARD HOFFMAN, *Clerk,*
By W. B. BEAIZLEY, *Deputy Clerk.*

36 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

THE COUNTY OF SIERRA, Plaintiff,
vs.
P. L. FLANIGAN, Defendant. } No. 12967.

Certificate to Record on Writ of Error.

I, Southard Hoffman, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing pages numbered from 1 to 34, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remain of record and on file in the office of the clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing transcript of record is $20.05; that said amount was paid by the defendant's attorneys, and that the original writ of error and citation issued herein are hereto annexed.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said circuit court, this 3d day of May, A. D. 1902.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of United States Circuit Court, Ninth Judicial Circuit, Northern District of California.

37 *Writ of Error.*

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the ninth circuit, northern district of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between P. L. Flanigan (defendant), plaintiff in error, and County of Sierra (plaintiff), defendant in error, a manifest error hath happened, to the great damage of the said P. L. Flanigan, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit,

together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 5th day of May next, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein
38 to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of April, in the year of our Lord one thousand nine hundred and two.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of the Circuit Court of the United States for the Ninth Circuit, Northern District of California.

Allowed by:
WM. W. MORROW, *Judge.*

Service of within writ and receipt of a copy thereof is hereby admitted this 7th day of April, 1902.

FRANK R. WEHE,
Attorney for Plaintiff, Defendant in Error.

The answer of the judges of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States circuit court of appeals for the ninth circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court.
[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

39 (Endorsed:) No. 12,967. Circuit court of the United States, ninth circuit, northern district of California. P. L. Flanigan, plaintiff in error, *vs.* County of Sierra, defendant in error. Writ of error. Filed April 15th, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to County of Sierra, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals, for the ninth circuit, to be holden at the city of San Francisco, in the State of California, on

the 5th day of May next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, ninth circuit, northern district of California, in a certain action numbered 12,967, wherein P. L. Flanigan is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said P. L. Flanigan as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William W. Morrow, judge of the United States circuit court, ninth circuit, northern district of California, this 5th day of April, A. D. 1902.

WM. W. MORROW, *Judge.*

40 Service of within citation and receipt of a copy thereof is hereby admitted this 7th day of April, 1902.

FRANK R. WEHE,
Attorney for Plaintiff.

(Endorsed:) No. 12,967. Circuit court of the United States, ninth circuit, northern district of California. P. L. Flanigan, plaintiff in error, *vs.* County of Sierra, defendant in error. Citation. Filed April 15, 1902. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

(Endorsed:) No. 832. In the United States circuit court of appeals for the ninth circuit. P. L. Flanigan, plaintiff in error, *vs.* The County of Sierra, defendant in error. Transcript of record. Upon writ of error to the United States circuit court for the northern district of California. Filed May 5, 1902. F. D. Monckton, clerk.

40½ *Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.*

41 At a stated term to wit, the October term A. D. 1902, of the United States circuit court of appeals for the ninth circuit, held at the courtroom, in the city and county of San Francisco, on Tuesday, the fourteenth day of October, in the year of our Lord one thousand nine hundred and two.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Order of Submission.

Ordered, cause argued by A. E. Cheney, Esquire, counsel for the plaintiff in error, no one appearing for the defendant in error and

submitted to Gilbert and Ross, circuit judges, and Hawley district judge, for consideration and decision, with leave to counsel for the plaintiff in error to file brief within ten (10) days.

42 In the United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Opinion U. S. C. C. A.

Upon writ of error to the United States circuit court for the northern district of California.

A. E. Cheney and Campbell, Metson & Campbell for plaintiff in error.

Frank R. Wehe, district attorney Sierra county, for defendant in error.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

HAWLEY, *District Judge:*

This action was brought by the county of Sierra in the State of California to recover of and from the plaintiff in error herein a license tax of two thousand five hundred dollars, it being alleged that the said plaintiff was engaged in that county in the business of sheep raising without having first paid the license tax required by ordinance number 54, passed by the board of supervisors of Sierra county, May 31, 1900. This ordinance consists of ten sections, which are set forth at length in the complaint. The first section reads as follows: "Each and every person, copartnership, firm or corporation engaged in the business of raising, grazing, herding or pasturing sheep in the county
43 of Sierra, State of California, must annually procure a license therefor from the license collector, and must pay therefor the sum of ten (10) cents for each sheep or lamb owned by, in the possession of, or under the control of such person, copartnership, firm or corporation, and used in such business in said county." This ordinance went into effect June 15, 1900, and ten days thereafter this action was brought. At the time this ordinance was enacted, the board of supervisors of each county of California was authorized, subject to the restrictions and limitations imposed by the constitution and general laws, to license for the purposes of regulation and revenue, all and every kind of business carried on in the county. (Stat. Cal., 1897, 465.) On March 23, 1901, a new section was added to the Political Code of the State of California to

be known as section 3366, which repealed the authority of the board of supervisors to license for revenue. (Stats. Am. Code Cal., 1900, 1901, 635.)

The averments in the complaint are sufficient to entitle the county to recover provided the ordinance referred to is constitutional, in all respects valid, and of full force and effect so far as this case is concerned.

The defendant in the court below (plaintiff in error) interposed a demurrer to the complaint on the general ground "that said complaint does not state facts sufficient to constitute a cause of action." This demurrer was overruled "with leave to defendant to answer within twenty days." No answer being filed the court directed judgment to be entered in favor of the plaintiff, as prayed for
44 in the complaint. From this judgment a writ of error is brought to this court to have the alleged errors therein corrected. There are five assignments of error which counsel for plaintiff in error have conveniently grouped under three propositions, viz.:

"(1.) The ordinance in question is an unjust, discriminating, oppressive and unconstitutional exercise of the power to license for the purposes of revenue.

(2.) By the repeal of the statute authorizing boards of supervisors 'to license for purpose of regulation and revenue' and restricting their power to license 'in the exercise of their police powers and for the purposes of regulation as herein provided, and not otherwise,' without any saving clause in favor of pending suits or unpaid license taxes, the legislature of the State destroyed the cause of action which it had authorized the board of supervisors to create, denied any remedy for its enforcement and abated this action.

(3.) The ordinance is a revenue, not a regulation measure. As an ordinance for purpose of regulation, it is illegal and void, because it does not regulate, and the fee charged is so unreasonable that the courts will, as a matter of law, declare that its real purpose is revenue and not regulation, and therefore void as a pretended exercise of the police power."

In the consideration of the various questions raised in this case, it must be remembered that at the time of the passage of the ordinance herein involved, it was expressly authorized by the "Act to establish a uniform system of county and township governments," approved April 1, 1897. (Stat. 1897, sec. 25, p. 465.)
45 The validity of similar ordinances—where several constitutional and other objections were raised—has been frequently sustained by the supreme court of California.

In re Guerrero, 69 Cal. 88, 91;
Ex parte Mirande, 73 Cal. 365, 372;
County of El Dorado *vs.* Meiss, 100 Cal. 268;
County of Inyo *vs.* Erro, 119 Cal. 119;
County of Los Angeles *vs.* Eikenberry, 131 Cal. 461, 465, 466.

These decisions are binding upon this court, and will be followed regardless of the decisions, upon similar questions, in other States. (Williams *vs.* Gaylord, 102 Fed. 372, 374 and authorities there cited; *id.*, 186 U. S. 157, 167.) It is however claimed that the case in hand presents other objections that were not considered or decided in the decisions above referred to.

The statute of 1897, among other things, authorized the board of supervisors to pass ordinances "to license, for purposes of regulation and revenue, all and every kind of business not prohibited by law, and transacted and carried on in such county, * * * to fix the rates of license tax upon the same, and to provide for the collection of the same, by suit or otherwise."

In 1901 the legislature passed "An act to add a new section to the Political Code of the State of California, to be known as section 3366, relating to the powers of boards of supervisors, city councils, and town trustees, in their respective counties, cities and towns, and to impose a license tax," approved March 23, 1901. (Stat. and Amend. to Codes, 1901, 635.)

46 Section 3366 reads as follows: "Boards of supervisors of the counties of the State, and the legislative bodies of the incorporated cities and towns therein, shall, in the exercise of their police powers, and for the purpose of regulation, as herein provided, and not otherwise, have power to license all and every kind of business not prohibited by law, and transacted and carried on within the limits of their respective jurisdictions, * * * to fix rates of license tax upon the same, and to provide for the collection of the same by suit or otherwise."

The supreme court of California has held that section 3366 repeals, by implication, the prior act of 1897, in so far as the same relates to the power to collect a license tax for revenue, thus restricting the licensing power of boards of supervisors, under the act of 1897, to matters of regulation alone.

Ex parte Pfirrman, 134 Cal. 143, 147, 148;
City of Sonora *vs.* Curtin, 70 Pac. 674;
Town of Santa Monica *vs.* Guidinger, 70 Pac. 732.

What effect does this repealing act have upon the present action which was brought under the provisions of the law of 1897, before it was repealed?

Counsel for plaintiff in error contend, that inasmuch as the law under which the ordinance for revenue purposes was passed, has been repealed, the ordinance is repealed as to all such purposes, and must be regarded as if it never existed except for the purposes of those actions which were commenced, prosecuted and concluded while it was an existing law, and rely upon the rule announced in many authorities, that where the right and remedy is given by stat-

47 ute to bring a civil action for the collection of a license tax,

the repeal of the statute destroys the remedy unless the repealing statute contains a saving clause.

Spears *vs.* County of Modoc, 101 Cal. 303;
Anderson *vs.* Burns, 122 Cal. 273;
State Hospital *vs.* Flaherty, 134 Cal. 315;
Ball *vs.* Tolman, 135 Cal. 375;
City of Sonora *vs.* Curtin, 70 Pac. 674;
Sutherland Stat. Constr., secs. 162, 163, 166, and authorities there cited;
Endlich on Int. of Stats., secs. 478, 480.

This principle has been applied more frequently to penal statutes and it may be regarded as an established rule that the repeal of a penal statute without any saving clause has the effect to deprive the court in which any prosecution under the statute is pending of all power to proceed further in the matter, and in such cases the proceeding will be arrested at the very point where it is at the time of the repeal. (Spears *vs.* County of Modoc, *supra*) because: "The repeal of the law imposing the penalty is of itself a remission." (State *vs.* Railroad Co., 3 How. 534, 552, and authorities there cited.)

The ordinance under discussion was adopted May 31, 1900; it went into effect fifteen days thereafter. This action was commenced June 25, 1900. The amendment to the Code, section 3366, was approved March 23, 1901. The judgment in this case was entered March 7, 1902. Under these circumstances does it necessarily follow that because a saving clause was not inserted, the act of
48 1901 should be given a retrospective operation? Does this question not depend upon the circumstances and conditions of each particular act, its nature and character? In the present case the transaction between the parties, under the ordinance of 1900, was closed; nothing was left to be done except to collect the license due which was authorized by the law then in force. Upon the facts of this particular case can it be said that it was the intention of the legislature by the passage of the act of 1901 to annihilate the cause of action provided for in the act of 1897, and terminate all pending suits for its enforcement, or was it simply to take away the power of the board of supervisors in the future to license for revenue only?

In The City of Oakland *vs.* Whipple, 44 Cal. 303, 305, which was an action for the recovery of a delinquent tax which was levied for the year 1869, and the action for its collection was commenced January 17, 1870, it was argued that the law under which said action was commenced was repealed after service of summons and before judgment; and it was there, as here, contended that the act passed in 1870 repealed all prior acts so far as they conflicted with that act, and that the plaintiff was left without any cause of action, and was not thereafter entitled to maintain an action for the collection of a tax theretofore levied. The court said "To hold that the act (of 1870) was intended to have a retrospective operation, so as to affect taxes which had already become due, would be to hold that the

legislature intended to remit all those taxes. A result so manifestly incompatible with the plainest provisions of the constitution, would not be inferred, but must be made apparent by clear and unequivocal language. That construction is not necessary in order to give full effect to the act, and, in our opinion, it was not intended that the act should have a retrospective operation; but the intent was that the taxes then due should be collected according to the law then in force."

In The Town of Belvidere *vs.* Railroad Co., 34 N. J. L. 193, 195, where an act authorizing the levying of a certain tax on the capital stock of the defendant was repealed after an assessment of the tax, but before its collection, it was held that the repeal did not prevent the collection of such tax, its collection being regulated by the general tax law, which had not been repealed. In the course of the opinion the court said: "The general legal rule, as found in Dwar. on Stat. 676, is referred to, viz., 'That when an act of Parliament is repealed, it must be considered (except as to transactions passed and closed) as if it had never existed.' But even if we accept this definition as strictly correct in its application to every case, still it is not perceived how, by force of it, the present tax is to be avoided. The case seems to fall within the exception contained in the rule as just quoted. The assessment of this tax closed and ended the transaction, so far as the act of 1862 was concerned. That act authorized the assessment, and appointed the mode of making it, but it had nothing to do with its collection, which was and is altogether regulated by other acts. When, therefore, this assessment was made, the force of the act of 1862 was, with respect to it, wholly spent and exhausted; the thing authorized to be done was completely done, and the consequence is, that even on the most stringent application of the rule as claimed, a repeal of the statute cannot invalidate a proceeding that was fully perfected while such statute continued in force. * * * As a question of intention, it is certainly very improbable that the legislature in 1866, by the repeal of the act of 1862, intended to annul assessments which had been made under the latter act, and which remained uncollected by reason of litigation, or from any other cause. Such a supposition would be most unreasonable. * * * As the tax now in controversy was assessed during the existence of the act of 1862, and as the proceedings for its collection do not depend on that act, my conclusion is, that the subsequent repeal of that statute cannot, on general principles, invalidate such assessment."

See, also, Dodge *vs.* National Bank, 109 Fed. 726, 731, and authorities there cited.

The defendant in error contends that the license fee or tax, after the preliminary steps taken for its collection, became a debt (and it is so expressly declared to be in the ordinance in question); and that it had a vested right to collect the same. It has frequently been held that a direct tax duly assessed and levied upon real or

personal property, is not a debt within the broad meaning of that term. But a license fee or tax does not stand upon the same plane. It is true that a vested right is usually based upon contracts, but it may also be based upon transactions in the nature of a contract.

In Sutherland on Stat. Const. sec. 164, the author said:
51 "When a right has arisen on a contract, or a transaction in the nature of a contract authorized by a statute, and has been so far perfected that nothing remains to be done by the party asserting such right, the repeal of the statute will not affect it or an action for its enforcement. It has become a vested right which stands independently of the statute."

The same rule is laid down by the Supreme Court of the United States in Steamship Co. *vs.* Joliffe, 2 Wall. 450, 455, where a pilot licensed under a statute had tendered his services to pilot a vessel out of port, and such services were refused, the court held that his claim to the half pilotage fees, allowed by the statute in such cases became perfect, and that the subsequent repeal of the statute did not affect the judgment rendered in an action brought to recover his claim. In the course of the opinion the court said: "The transaction * * * between the pilot and the master or owners cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a quasi contract. The absence of assent on the part of the master or owner of the vessel did not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting. * * * In such case the party makes no promise on the subject; but the law, 'consulting the interests of morality,' implies one; and the liability thus arising is said to be a liability upon an implied contract."

In the present case the plaintiff in error did not directly
52 promise to pay the license tax demanded by the defendant in error, but he herded and grazed his sheep in Sierra county when the law for the imposition and collection of the license tax was in full force and effect. He reaped the full benefit of the law, and then refused to comply with it. Do not these facts virtually bring this case within the rule announced in the Joliffe case?

Similar principles are announced in United States *vs.* Williams, 8 Mont. 85, 90, where the defendant sought to avail himself of the repeal of the regulations by the Secretary of the Interior forbidding the cutting of timber on the public land. In the course of the opinion the court said: "The question then arises, What were the rights of the United States in relation to this timber? * * * The timber had been unlawfully cut and converted and the right of the United States to receive compensation for its property completely vested. What effect, then, did the subsequent revocation of these rules and regulations, touching the cutting of such timber, have upon this right? We take it that the modification of the rule is analogous to the repeal of the statute, and that its effect must be

determined by the rules of law, governing the repeal of the statute under which the alleged right had arisen, and which was being prosecuted in the courts, but still had not been reduced to a judgment."

After referring to the general rule, the court said: "But there are certain exceptions to this general rule. Where trouble and expense may have been incurred, and suits may have been instituted, the effect of a retrospective construction of repealing statutes is entirely to derange the plans and defeat the arrangements of parties
53 who have proceeded on the faith of antecedent legislation, and an effort has been made to arrest these results and certain exceptions have been made to this retroactive legislation. Where, then, a right in the nature of a contract has vested under the original statute, then the repeal does not disturb it." The court then states and approves the rule in the case of Steamship Co. *vs.* Joliffe, *supra*, and adds: "While the action in the present case cannot be said to be one of contract, but an action of tort for the wrongful cutting and conversion of the timber of the plaintiff, it is hard to imagine a distinction between the right to recover for trees cut and converted wrongfully, and money due for their delivery under contract. If the right is vested in the one case, it seems to us it is equally as clearly vested in the other. Indeed, the timber when cut may be deemed personalty, and the plaintiff might waive the tort, and sue for it in assumpsit as so many cords of wood sold and delivered. It seems to us, then, that the plaintiff's right in this case comes within the exceptions to the general rule already stated, by which the right of action is defeated upon the repeal of the law under which it was brought."

The views already expressed are conclusive of the case, and render it unnecessary to consider other questions elaborately argued by counsel. The judgment of the circuit court is affirmed, with costs.

(Endorsed): Opinion. Filed March 4, 1903. F. D. Monckton, clerk.

54 United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Judgment.

In error to the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said circuit court in this cause be, and the same is hereby affirmed, with costs.

(Endorsed): Judgment. Filed and entered March 4, 1903. F. Monckton, clerk.

55 At a stated term, to wit, the October term A. D. 1902, of the United States circuit court of appeals for the ninth circuit, held at the courtroom, in the city and county of San Francisco, on Wednesday, the twenty-seventh day of May, in the year of our Lord one thousand nine hundred and three.

Present: The Honorable William B. Gilbert, circuit judge; Honorable William W. Morrow, circuit judge; Honorable Thomas P. Hawley, district judge.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Order Denying Petition for a Rehearing.

Ordered, petition for a rehearing, heretofore filed herein, denied.

56 United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Certificate of Clerk C. C. A. to Transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing fifty-five (55) pages, numbered from one (1) to fifty-five (55) inclusive, to be a true copy of the record and of all proceedings had in the above-entitled case in the said the United States circuit court of appeals for the ninth circuit as the same remain of record in my office.

Attest my hand and the seal of the said the United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 29th day of July, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

57 UNITED STATES OF AMERICA, *ss*:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Being informed that there is now pending before you a suit in which P. L. Flanigan is plaintiff in error and The County of Sierra is defendant in error which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the northern district of California, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
58 States, do hereby command you that you send without delay to the Supreme Court, as aforesaid, the record and proceedings in said cause, so that the Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 20th day of October, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

59 [Endorsed:] File No. 19,077. Supreme Court of the United States. No. 426, October term, 1903. P. L. Flanigan *vs.* The County of Sierra. D. No. 832. United States circuit court of appeals for the ninth circuit. Writ of certiorari. Filed Oct. 26, 1903. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

60 In the United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Stipulation that Record Filed in Supreme Court be Taken as Return to Writ of Certiorari.

Whereas, heretofore the plaintiff in error above-named filed in the Supreme Court of the United States his petition for a writ of certiorari requiring the above entitled court to certify to the said Supreme Court for its review and determination the above entitled cause,

And whereas, together with said petition said plaintiff in error filed in said Supreme Court a certified transcript of the record of the said cause and of the proceedings had therein in the said circuit court of appeals, and in the circuit court of the United States, for the ninth circuit, northern district of California,

And whereas, upon said petition a writ of certiorari according to the prayer of said petition issued out of and under the seal of said Supreme Court to the judges of said circuit court of appeals,

Now, therefore, be it and it is hereby stipulated by and between counsel for the respective parties hereto that the said tran-
61 script may be taken as and for a return to said writ.

Dated this 28th day of October, 1903.

A. E. CHENEY,
J. C. CAMPBELL,
W. H. METSON,
Attorneys for Plaintiff in Error.
FRANK R. WEHE,
Attorney for Defendant in Error.

(Endorsed:) Stipulation that record filed in Supreme Court be taken as return to writ of certiorari. Filed Nov. 4, 1903, F. D. Monckton, clerk.

I, Frank D. Monckton, clerk of the United States circuit court of appeals, for the ninth circuit, do hereby certify the foregoing to be a full, true and correct copy of "stipulation that record filed in Supreme Court be taken as return to writ of certiorari," filed on the 4th day of November, 1903, in the foregoing entitled cause as the original thereof remains of record in my office.

Attest my hand and the seal of said circuit court of appeals, at San Francisco, California, this 18th day of November, A. D., 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

62 United States Circuit Court of Appeals for the Ninth Circuit.

P. L. FLANIGAN, Plaintiff in Error,
vs.
THE COUNTY OF SIERRA, Defendant in Error. } No. 832.

Return to Writ of Certiorari.

By direction of the judges of the United States circuit court of appeals for the ninth circuit, I, Frank D. Monckton, clerk, in obedience to the annexed writ of certiorari issued out of the honorable the Supreme Court of the United States and addressed to the honorable the judges of the United States circuit court of appeals for the

ninth circuit, commanding them to transmit to the said Supreme Court the record and proceedidgs in the above entitled cause, do attach to the said writ a certified copy of a stipulation entered into between the counsel for the respective parties to the said cause on the 28th day of October, 1903, the original of which stipulation is of record in my office and do hereby certify the same as due return to the said writ.

In testimony whereof, I have hereunto set my hand and affixed the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 18th day of November, A. D. 1903.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

63 [Endorsed:] File No. 19,077. Supreme Court U. S., October term, 1904. Term No. 121. P. L. Flanigan, petitioner, *vs.* The County of Sierra. Writ of certiorari and return. Filed Nov. 27", 1903.